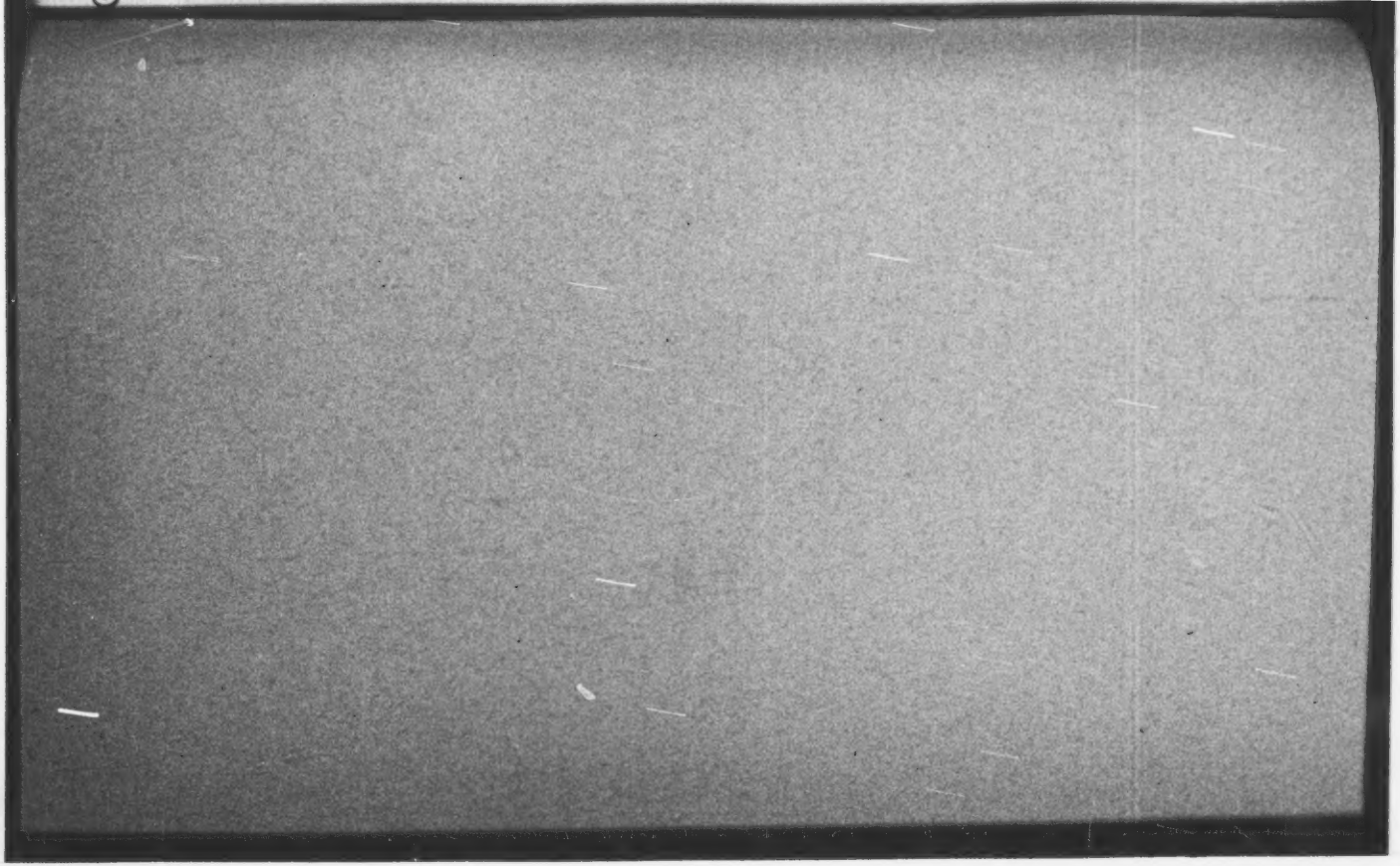


FILED
DEC 17 1898
JAMES H. McKENNEY,
Cl

No. 6442. 172

Brf. of Peckham for Respondent.

Supreme Court of the United States.

Filed Dec. 17, 1898.

THE CITY OF NEW ORLEANS,
Petitioner,

vs.

JOHN G. WARNER,
Respondent.

Additional Brief for Respondent.

Petition for certiorari to the Circuit Court of Appeals for the Fifth Circuit.

First.—If the views of this Court expressed in Amer. Constr. Co. *vs.* Jacksonville, Ry. Co., 148 U. S., 383, are to prevail in the disposition of this application then surely the prayer of the petition must be denied.

The case presents no question of public international law and no question as to rules or principles which guide the operations of a great class of people as navigators are guided by the rules of navigation.

I am of course aware that the rule stated in that case must have been somewhat relaxed because the succeeding volumes of the reports show that applications for the writ have been more frequently successful.

While however more writs have been issued no other principle seems to have been promulgated and it would seem to be a fair inference that litigation of an ordinary character and involving but ordinary questions should stop with the judgment of the Circuit Court of Appeals.

Second.—If tried by such test this application should be denied.

Not only is there no important question of law involved, but the learned counsel for the petitioner themselves in the opening remarks of their brief substantially say that there is none.

Addressing themselves to the supervisory power of this Court, they say that petitioner relies more upon the equities of its case than upon the *legal grounds* of attack against the decree of the Court below.

Has this Court extended the rule as to when the writ will issue so as to embrace a case where petitioner claims that the equities were wrongly decided. If it has, *can* any case in equity be excluded? The bare statement of such a claim would seem to be its refutation.

What again, can complainant mean by speaking of the hard and oppressive character of the contract on which complainant sues?

There is no cross bill to set aside the contract on any such or any grounds.

No such defense is pleaded in the answer.

Relief or defense must be founded on "allegata" quite as much as on "probata."

Will the writ run to remedy a wrong or to establish a defense *not* alleged?

There is in the answer an allegation that "the sale thereof" *i. e.* dredge boats, etc., "for the price stipulated as to such property was a fraud upon this defendant and its taxpayers," Record p. 199.

No act however is alleged—no collusion, no deception, nothing from, or because of which the inference of fraud could be drawn.

It is too well settled for discussion that neither in bill or answer can such an averment form the basis for the taking of testimony or for a decree.

Third.—Turning then to the minor errors complained of as errors of law.

The principal ground of complaint seems to be that the Court below ignored or overlooked or said nothing about the defense of *res adjudicata.*

But what better could the Court have done? Why should it not have been ignored? And why should the Court be taken to task for its tenderness to the petitioner in ignoring this defense?

Is any principle better established than that to be *res adjudicata* the matter must have been before adjudged in a controversy between the same parties or their privies?

Now, there is not in this answer a suggestion that the former judgment referred to was between these parties or their privies, but the contrary is affirmatively alleged.

The judgment referred to is alleged to be that of one Peake *vs.* City of New Orleans. Nothing is alleged in any way to connect the complainant herein therewith.

The case may or may not be a precedent or an authority in later controversies, but who before ever heard of pleading a precedent or an authority?

Could the Court do better for the petitioner than to cover the point with the mantle of oblivion?

Fourth.—Petitioner says that the Court below misconstrued the decision of this Court in this case in answer to the questions certified to it by the Circuit Court of Appeals and says on p. 3 of brief of counsel "that the superiority" which this Court "held to be enjoyed by the purchase warrants over those issued for work is found in the fact that the former were issued as the price of the sale of the property."

This Court held no such thing.

This Court held that the warrants issued to pay for a purchase made by the city itself pursuant to an act giving the city authority to purchase or not, as it in its discretion should determine were not affected by the bonds issued by the city while warrants issued under acts which required the city to issue them and gave it no discretion, were affected by the bonds issued by the city (Record, p. 588. quoting opinion of this Court in this case, 167 U. S.). Neither petition nor brief of counsel nor the record shows that the Court below construed the decision of this Court as deciding anything else.

Fifth.—The opinion below, after reciting all the defenses pleaded in the answer, including that of *res adjudicata*, says, page 590, that as to *nearly* all of them they might rest their decision on *the opinion* of this Court in answer to the certified question, and then goes on to discuss and pass upon all the defenses except that of *res adjudicata*, which apparently it rightly deems needs no discussion.

It does say that all the facts averred in the bill have either been "admitted by the answer or abundantly established by the evidence."

Can it be that this Court deems that the minute examination of evidence in order to determine a question of fact not seriously disputed presents a case proper for a writ of *certiorari?*

Sixth.—The Court held that the city as to these warrants was a trustee by her voluntary contract. The demurrer of course admitted the allegations that the city had violated its duty by omitting and preventing collections, etc., etc.

The Court below says on answer and proofs that the city has so violated its duty and refers to the judgment of the State Court in Davidson *vs.* New Orleans, 34 La. Am., 170, as having also so adjudged. Record, p. 591.

Is it a case for *certiorari* on a question of fact when it has been decided the same way by both State and Federal Courts?

Seventh.—Petitioners claim the benefit of several statutes of limitation—but when was it ever suggested that a statute of limitations ran as between trustee and *cestui que trust* the trustee not repudiating, but alleging as the City of New Orleans does in its answer that it has performed and still is performing its trust? Could any thing more *inequitable* be imagined?

Eighth.—That the mere fact that the litigation may involve a considerable sum is no reason, for a certiorari goes without saying. The amount *directly* involved is six thousand dollars and interest. Holders of other similar warrants may come in under the decree and prove them, thus raising the amount indirectly involved, including interest, to say eight hundred thousand dollars.

In these days of litigation as to large interests involving many millions of dollars, surely the amount at issue in this suit cannot call for a certiorari.

Ninth.—The fact that the city is charged as assessee for streets and squares is no ground for the writ.

That public property benefited should pay for the benefits like any other beneficiary is surely just and honest.

Such benefits should be paid for by the public represented by the municipality.

That has been done in this case—nothing more—and the doctrine is too familiar and too emphatically just to warrant the issue of a writ in order to dispute it.

Tenth.—The alleged error in making the city personally responsible does not exist. An account is ordered and the city is to be charged with the assessments collected, or which should have been collected, and which the city negligently omitted to collect.

The city is charged with nothing more, and is to be credited with all that it has paid out, except the bonds which this Court has said that the city is estopped to plead.

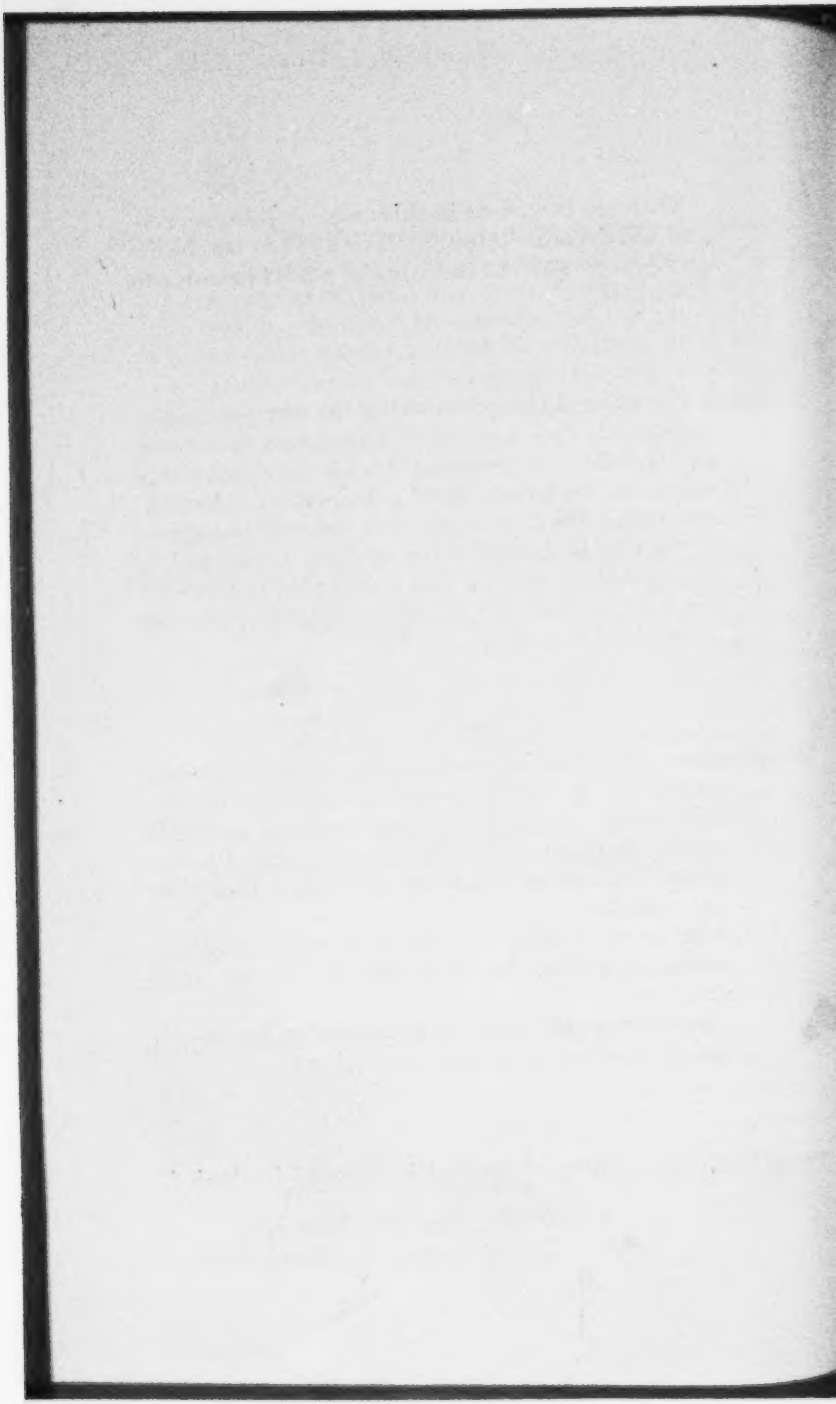
Eleventh.—The last alleged error is the most comical of all. That the constitutional clause limiting debt and which in terms excepts drainage warrants should be claimed to apply, because the city has committed a breach of trust by failing to collect assessments.

In other words, the city has squandered the assets and claims that it should not be accountable.

Is it supposed that the constitution has legalized a breach of trust and conversion?

Twelfth.—The prayer of the petition should be denied.

WHEELER H. PECKHAM,
Of Counsel for Respondent.



No. 640. 172

Brf. of Peckham for Resp't. Con

JAN 30 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed Jan. 30, 1899

THE CITY OF NEW ORLEANS,
Petitioner,

against

JOHN G. WARNER,
Respondent.

No. 640, Oct. Term, 1898.

This is a motion to advance this cause for a hearing.

The motion is made by the respondent, John G. Warner, to a petition by the City of New Orleans for a writ of certiorari to the United States Circuit Court of Appeals, which petition was granted.

The petitioner, the City of New Orleans, joins in the request for advancement.

POINTS.

First.—This case has so recently been before the Court on motion to dismiss appeal, which was granted—on motion for certiorari which was granted, and earlier on certificate of certain questions raised by demurrer, reported 167 U. S., 467, that I may assume that the Court is sufficiently familiar with it to dispense with any further statement.

Second.—The cause is entitled to be advanced under Sub. 4 of Rule 26.

The former hearing was on a demurrer for want of equity and the question certified to this Court was on the merits and the adjudication was on the merits.

The adjudication was that the city of New Or- Orleans is estopped to set up the issue by the city of certain bonds as a defence herein.

That there may be some other questions involved is no reason why the case should not be advanced—but the contrary.

Presumptively *second* appeals or writs of error involve new or additional questions or they would not be brought.

Third.—True, this case is not "again brought up by *writ of error or appeal.*"

The rule is, I believe, older than the statutes organizing the Circuit Courts of Appeals and allowing writs of certiorari.

The function of the certiorari is, however, the same as that of a writ of error or appeal. It brings the case here for adjudication or decision.

Fourth.—It would be of the greatest moment to the parties to this cause if the Court could decide this motion before the vacation, and if granted, assign a day for the hearing so that the parties may be ready on the reassembling of the Court on the day assigned.

WHEELER H. PECKHAM,
Of Counsel for the Original Plaintiff.

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

No. 640.

CITY OF NEW ORLEANS, APPELLANT,

versus

JOHN G. WARNER, APPELLEE.

ON CERTIORARI.

STATEMENT OF THE CASE.

By an act of the Legislature of Louisiana, approved March 18, 1858, provision was made for reclaiming and draining certain portions of the city of New Orleans. For this purpose three districts were established, and the work was to be accomplished through the instrumentality of boards of commissioners, who were authorized to levy special assessments on each superficial square foot of the lands within the several districts, to defray the cost of the improvement. These assessments, when made, were to become and remain a lien on the lands until paid (Statutes, pp. 1 to 6). By a later act, approved March 1, 1861, the commissioners were authorized to reduce the assessments to judgment against the property itself, and the owners thereof, upon which execution might issue in the ordinary mode (Statutes, pp. 8 and 9). Assessments

were thereafter made upon the regular rolls, pursuant to law, which included the city of New Orleans as owner of the streets, squares and public places, as well as the owners of private property; and these assessments were reduced to judgment, in the statutory mode, against the city and private owners (R., pp. 110 to 112, pp. 21 to 46, 46 to 58, 58 to 70, 70 to 84, 84 to 91). The boards of commissioners continued to act until 1871, when, by Act No. 30 of that year, the Legislature (Statutes, pp. 9 to 13) subrogated the Board of Administrators of the city of New Orleans to all the powers, and transferred to them the assessment rolls, which the act declared "are hereby confirmed and made eligible," and the city was directed to collect the taxes and place the same to the credit of the Canal Company. By Sec. 1 of this act the Mexican Gulf Ship Canal Company was designated to do the drainage work; and by Sec. 2 the company was specially authorized to dig a canal, and with the earth excavated to build a protection levee around the city, the location whereof to be designated and fixed by the city. By the third section, the company was authorized to dig such other canals as the city might designate. By the eighth section, it was provided that the work should be examined by the City Surveyor, and upon his certificate of the amount of work done, be paid for by an order drawn by the Administrator of Accounts against the Administrator of Finance, payable on presentation, "in case there be any funds in the City Treasury to the credit of the Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash said warrant or warrants, then the Administrator of Finance is required to endorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of 8 per cent. per annum until paid, which condition shall be set forth in the form of said warrants."

In 1876 the Legislature by Act No. 16 of that year

(Statutes, pp. 15 to 17) authorized the city to contract for the purchase from the Canal Company, and its transferee, all their "rights, franchises and privileges authorized, created or arising under or by virtue of Act 30 of Acts of 1871, also for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats and apparatus belonging to said company, and its transferee."

By the second section it was provided that the value of the rights and things purchased should be fixed by appraisers appointed by the city; and by Sec. 3, the price was to be paid in drainage warrants, "in the same form and manner as those heretofore issued to the transferee of said company, under Act No. 30 of 1871 for work done."

Sec. 4 provided that after the purchase the city should alone have the power to do all the drainage work itself.

The franchise and property of Warner Van Norden, transferee of the Canal Company, were appraised by the city (R., pp. 91 to 97 and 104), and the city issued drainage warrants for the price, in the same *form and manner* as those theretofore issued for work done, as prescribed by the act of 1871. In the act of sale and purchase the city expressly stipulated "not to obstruct, but on the contrary to facilitate by all lawful means the collection of drainage assessments as provided by law until said warrants have been fully paid," etc. (R., p. 102).

The bill in this case was filed on the 26th day of November, 1894, by complainant as holder of $6000 of the purchase warrants, in behalf of himself and all other holders similarly situated. The bill avers that the city has collected a considerable amount of the drainage assessments, and would have collected more but for its acts of obstruction and neglect of duty in violation of its contract; that the city would set up as a defence that it had discharged its liability to the drainage fund by the issue of bonds to take up warrants given for work done prior to said purchase, in excess of the whole amount of the as-

sessments, if it ever was liable therefor; and would, in this respect, rely on the decision in the case of James W. Peake versus New Orleans, 139 U. S. 342 (R., pp. 1 to 19).

The defendant demurred to the bill (R., p. 166), which was sustained by the Circuit Court, on the authority of that case (R., p. 169). Upon appeal the Circuit Court of Appeals certified the question to this court, whether defendant was estopped by its covenants to plead the issue of said bonds as a discharge of its liability to the holders of the purchased warrants (R., pp. 174 to 179). This Court answered the question in the affirmative (see Warner vs. New Orleans, 167 U. S. 467) and the Court of Appeals thereupon reversed the decree on the demurrer (R., p. 180).

The defendant then filed an answer, alleging in substance that it had at all times, up to the date the bill was filed, continually used every effort to collect the drainage assessment against private persons, admitting that it had collected over $300,000 of drainage taxes from 1871 up to June 20, 1891), and tendering an account of the collections and their expenditure. As an excuse for not collecting more, the answer avers that the drainage plans were so defective that the work could not be completed with any benefit to the property assessed, and that the Supreme Court of the State for this reason has decided that the consideration for the assessments had failed, which has rendered further collections impossible. The defendant then denied that the city is itself liable for the assessments on the streets, etc., and again pleaded the issue of the bonds as a discharge of its liability. The answer concludes with a plea of the prescription of five years against the warrants, and ten years against all personal actions, for an accounting of the trust fund (R., pp. 186 to 203).

The Circuit Court dismissed the bill after a trial on the merits, but without making any finding or giving any

written opinion (R., p. 544). Upon appeal by complainant the Court of Appeals reversed that decision and gave decree in favor of complainant (R., p. 550). It is this decree which is now sought to be reviewed on the writ of certiorari. The petition upon which the writ was granted does not contain any very clear or precise statement of the errors upon which the city relies, and we are therefore compelled to take up the salient points, without much regard to orderly arrangement.

ARGUMENT.

I.

One complaint is that the Court of Appeals erred in holding that the alleged defects in the drainage plan were attributable to the city. But this is not supported by the record. What the court did find was that though the general plan under which the work was undertaken was prescribed by the Legislature in the Act of 1871, it was subject, however, to the power of the city to fix the location and prescribe the number of the interior canals; and that, as a matter of fact, the city, through its ordinances, based on the recommendation of its engineer, actually located each canal that was excavated by the Canal Company, and that its own officers supervised the work. The court further found that the principal objection made to the plan by some of the engineers was that it did not provide a sufficient number of interior canals to meet the future requirements of a growing city, but that this defect, if it existed, was chargeable to the city and not to the constructors, and the record shows that these findings of the court are correct, for the city, on April 27, 1871, passed Ordinance No. 814 (R., p. 244), placing the matter of locating the levees and canals in the hands of the Mayor and Administrator of Finance, and declaring that the city would not pay for any work unless it should be authorized

by this committee. Other ordinances of a similar character were subsequently adopted.

May 20, 1870, the city, by Ordinance No. 820 (R., p. 246), authorized the extensive work therein specified, to be done in accordance with Ordinanee 814.

July 19, 1871, the drainage committee submitted a plan of the work to be done (R., p. 258). February 16, 1872, the city by Ordinance 1362 (R., p. 259), authorized other extensive work to be done, but reserving the right to stop any portion of the work at any point of its progress.

August 4, 1875, Ordinance 3209 (R., p. 319) was adopted authorizing the Canal Company to dig the Nashville Avenue Canal to be located by the City Surveyor. Other works were authorized by like ordinances unnecessary to enumerate. Not only do these ordinances show that the city directed with great particularity what work should be done, but W. H. Bell, City Surveyor at that time, who was asked "who planned the work under that act" (Act 30 of 1871), says: "I was City Surveyor and drew the plan for the work with the approval of the City Council. It was submitted to the council and approved by them—the different lines and maps" (R., p. 220). A copy of this plan or map showing the amount of work done thereunder is in evidence and bears the name of "W. H. Bell, City Surveyor."

The weight of the evidence is that if the plans of the city had been carried out as devised by Bell it would have accomplished the drainage of the city. *See* depositions of W. H. Bell (R., p. 221), Fremeaux, his assistant (R., p. 285); Collins, Administrator of Improvements (R., p. 224); A. C. Bell, present City Surveyor (R., p. 307), and Palmer (R., pp. 294, 295).

If the complaint of the city that the plan was defective in not providing a sufficient number of interior canals, as testified to by Engineer Brown (R., p. 451), and Harrod (R., p. 467) is well founded, it was clearly its own fault,

and not that of the contractor, who could do nothing without its consent.

In the face of this evidence, counsel for the city, as the Court of Appeals says in its opinion, frankly abandoned at the argument all pretence that the defects in the plan, if any existed, were chargeable to the Canal Company or its transferee.

As to the character of the work which the answer charges was defective and bad, H. C. Brown, assistant surveyor of the city, who had immediate supervision of the work, called as a witness for the defendant, being asked whether the work was well done, says: "It was well done; there is no question about that—never has been, I think" (R., p. 458). As he was the officer of the city charged with the duty of certifying the work for payment, his evidence is conclusive on this point, especially as he is the only witness who has testified on the point.

The Court of Appeals having found that the drainage work was done under plans furnished by the city itself, further found, that these plans, if they had been carried out, which could have been accomplished at the expense of about $500,000 (R., pp. 590 and 456 to 459), would have sufficiently drained the city to have earned the assessments and make them available for the payment of the purchase warrants: but that the consideration of the assessments failed, and they became uncollectible, because the city failed to complete the work, as the Supreme Court of Louisiana has adjudged in the case of Davidson vs. New Orleans, 34 La. An. 170.

The Court further found from the evidence of Harrod and Brown, that the city has recently adopted a plan devised by them for the drainage of the city in which all this old work is utilized, which is estimated to cost over $8,000,000 (R., pp. 591 and 481). The only difference between the new plan and the old one devised by Bell, is the provision made for additional interior canals, with

more pumping stations and with an outlet into Bayou Bienvenu.

In view of all these facts, did the Court of Appeals err in holding that by not completing the old plan of Bell, the city had failed to do what "was reasonable and fair" to make the assessments—— ,the fund good, out of which these purchase warrants were to be paid? Not only did the city neglect to complete the work which it might have done by a comparatively small expenditure of money, but it notified the taxpayers not to pay the assessments until their liability should be determined by the Supreme Court, referring to the case of Davidson vs. New Orleans, 34 An. 170, a decision which subsequently afforded all unwilling taxpayers an excuse to repudiate their liability, on the ground that the city had not completed, and was not likely to complete, the drainage system.

The defects in the plans of the city and its neglect to amend them, and devise and complete a proper system, was no doubt a sufficient excuse to the private property holders for refusing to pay their assessments; but we fail to see upon what principle the city can set up these faults, to avoid the assessments against itself, or to escape liability for the assessments against private persons, lost by the same faults and omissions. The city, as we will show, in another part of this brief, having acquired the property of Van Norden on the faith of the validity of the assessments, and having warranted their existence by drawing warrants against them for the payment of the purchase price of the property, should not now be permitted to avoid liability on account of the alleged vices in the plans, even if they were not its own.

Under all these circumstances, the Court was clearly right in applying the maxim that, "Equity looks upon that as done, which ought to have been done," and charging the city with the amount of all assessments as money collected and in hand for the payment of the warrants.

II.

Another complaint is that the Court of Appeals erred in charging the city with liability for assessments against itself, on the area of the streets, squares and public places, as *quasi*-owner.

These assessments were levied under authority of Act No. 165 of 1858, creating the drainage districts, to be found *in extenso* in the printed pamphlet of the acts of the Legislature filed with the record.

The Boards of Commissioners, by Sec. 7, were required, whenever they were prepared to drain their respective districts, to make a preliminary plan designating the section to be drained and describing the property therein, with the names of the owners, and to deposit it in the mortgage office, and give notice thereof in a newspaper published in the city of New Orleans. They were then authorized to apply to one of the District Courts of the parish for the approval of the plan, which Court the statute declared—

> "Shall decree that each portion of property situated in said limits is subject to a first mortgage, lien and privilege in favor of such Board of Commissioners for such amount as may be assessed upon the property for its proportion of the cost of draining such section."

Sec. 8 provided:

> "That said Boards of Commissioners, each within its own section or district, shall have the right and are hereby authorized and empowered to levy such uniform assessments upon the superficial or square foot of land situated wiihin the drainage section or district of such board to defray the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of this act."

This act was amended in 1861 by Act No. 57, which provided a mode for reducing the assessments to judg-

ment, authorizing the court named therein to approve and homologate said assessment rolls, "which shall be judgments against the property assessed and the owners thereof, on which execution may issue as on judgments rendered in the ordinary way."

The preliminary descriptive plan in the several districts was approved by the Court upon the petition of the Board of Commissioners.

In the First District, August 24, 1861 (Exhibit A. R., p. 22).

In the Second District, March 15, 1869 (Exhibit B. R., p. 47).

In the Third District, the descriptive plan was made by Surveyor Bell, under the authority of the city, as successor to the Boards of Commissioners, pursuant to Act 30 of 1871, and approved by the Court upon the petition of the city, May 4, 1872 (Exhibit D. R., p. 70-1).

Subsequent to these preliminary proceedings, assessments were made by the commissioners of the districts, and judgments based on these plans were rendered in their favor for the same against the city and private property holders.

Later the city of New Orleans itself levied assessments in the several districts, based on the same plan, in its capacity as successor to the old board under Act 30 of 1871, and presented petitions to the proper court praying for judgment thereon against the property holders, including itself, for the amounts due.

From a judgment denying the prayer of this petition of the city to homologate the assessment rolls in the First District, the city took an appeal to the Supreme Court (R., pp. 27-8). That court upon its appeal reversed the judgment (see In the Matter of the Commissioners of the First Drainage District, 27 La. An. 20). The Court below then approved the assessment and gave judgment

for the amount against the property holders, including the city (R., p. 28).

All the assessments made prior to the date of Act 30 of 1871 were approved and confirmed by the ninth section of the act, which included the city of New Orleans as assessee of the streets and other public places.

All this is set out in the bill of complaint and appears in authentic form from the exhibits filed therewith, copied into the record between pages 21 and 90; and the answer of the defendant (R., p. 189) admits the averments of the bill with reference to the foregoing proceedings to be true, but alleges, in avoidance of the liability of the city, the nullity of the assessments and judgments.

The first ground of nullity alleged is that the streets, squares and public places are public things, and as such were exempt from taxation at the time these assessments against the city were levied. But, admitting that they are public things, we find nothing in the Constitution or laws of the State, and none is referred to by appellant, exempting them even from taxation, much less from special assessments for a local improvement. The most that can be claimed is that they are, owing to their character, not generally presumed to fall within the class of property intended to be taxed. It is, at most, a question of presumption, and not of the power of the Legislature to impose taxes upon such property. But the levy of local assessments for the improvement of property benefited thereby, is not, according to the weight of authority, considered as taxation in the sense in which that term is generally used.

This distinction has been uniformly recognized by the courts of the State of Louisiana. Says the Supreme Court of that State in Charnock vs. Levee Co., 38 La. Annual, 326.

> "In the course of time the matter has been considered over and over again in our courts, and in the

courts of sister States; and by an inveterate course of decisions, with rare exception, it has ripened into a settled principle of constitutional construction, that local assessments, or contributions, provided for the purpose of constructing public works for the advantage of particular districts, and levied upon property benefited thereby, and with reference to such benefits, are not considered as t`xes, within the meaning of constitutional restrictions on the power of taxation."

Board of Levee Commissioners vs. Lorio Bros., 33 La. Annual, 276.

Railroad vs. Board of Health, 36 La. Annual, 666.

Burroughs on Taxation, Chap. 22.

Cooley on Taxation, Chap. 20.

The same Court again reviewed the qnestion in Barber Asphalt Co. vs. Gogreve, 41 La. Annual, 263, citing the Drainage case in 11 La. An. 371, which arose under the drainage act of 1835, which is in all respects similar to the acts involved here.

But it is said that admitting the rule in regard to taxation does not apply to local assessments, still, as the act of 1855 did not expressly include public places, it ought to be held to exclude them by construction.

The conclusive answer to this contention is that the Legislature, with unlimited power to select the property chargeable with the cost of drainage, expressly directed that each superficial square foot within the several districts should be assessed therefor, without any words of exclusion or exemption.

As the act of 1858 is a substantial re-enactment of the act of 1835, amended in 1839, a copy of which is printed in the Drainage Case (11 La. An., p. 342), it may be assumed that the Legislature enacted it with the full knowledge and understanding that it would receive the same construction which had been given the original in that case two years before--*i. e.*, that the city was liable

for drainage assessments on the streets and other public places, although neither the city nor the public places were expressly included in the statute.

This construction has been accepted and followed in Louisiana ever since without qualification.

Marqueze vs. New Orleans, 13 La. An. 319.

Correjolles vs. Succession of Foucher, 26 La. An. 362.

Asphalt Paving Co. vs. Gogreve, 41 La. An. 259.

And the precise question has been decided in conformity with these cases in County of McLean vs. City of Bloomington (106 Ill. 209), in which the Court holds that a statute authorizing the assessment of property within a certain district for a local improvement includes the property of a municipal corporation therein *ex vi termini*, in the absence of express words of exclusion.

Moreover, the Boards of Drainage Commissioners in assessing the city, and the Legislature in approving the assessments in the act of 1871, gave this construction to the law; and the city, by assessing the streets to itself, and obtaining judgment against itself for the amount of the assessments, published to the world that it adopted such construction.

It admitted in the most solemn form that the law imposed upon it a liability for a part of the cost of this local improvement. Having, as it did, unlimited power to contract for the improvement of the public streets and squares under its charter, it could consent to be charged with a part of the cost of the work without the authority of a special statute.

The city was under no compulsion to submit to the judgment rendered in favor of the commissioners, nor to assess itself. It might have appealed from all the judgments, and did appeal from one of them, refusing to confirm one of the assessments, and procured a decree of the Supreme Court of the State affirming such assessment, which included itself as assessee of the streets and

public places. It might have refused to assess itself but did not. And now, having since contracted obligations payable out of these very assessments, it seems to us that common honesty forbids the city to deny its liability.

III.

Another complaint is that the Court of Appeals erred in holding that the city was estopped from disputing the validity of the assessments and judgments against itself, on the same principle that it was estopped from pleading the issue of bonds as a discharge from liability, as adjudged by this Court in Warner vs. New Orleans, 167 U. S. 467.

This involves the question whether the city, in purchasing the drainage property and franchise of the Canal Company, and its transferee, did not warrant the existence and validity of the assessments and judgments against itself; also, whether it is not estopped by its conduct to deny their legality.

The purchase price was paid by warrants drawn against and payable out of the drainage fund, composed partly of these very assessments and judgments. Whatever difference of opinion may exist among jurists as to the effect of an order drawn against a general credit, all the authorities hold that an order drawn against a particular fund, out of which it is payable, amounts to an equitable assignment thereof in favor of the payee.

Citizens Bank vs. First National Bank, L. R. 6; House of Lords, 352; English R. 7; Moak, 36.

In Gordon & Gomilla vs. Muchler, 34 La. An. 605, this point was expressly decided, and the supposed distinction between the civil and common law on the subject explained. And the Court held that even a written order by a creditor addressed to his debtor, and notified to him, payable out of a general fund, operates as a complete

legal assignment of the credit or incorporeal right referred to in the order, under Arts. 2642 and 2654 of the Civil Code.

To the same effect is the decision of Mr. Justice Miller in Bank vs. Coates, 12 Reporter, 514.

The obligation assumed by one who draws such an order is fixed by the Civil Code of Louisiana, under the title relating to the "assignment or transfer of civil credits and other incorporeal rights."

Art. 2646 says:

> "He who sells a credit or incorporeal right warrants its existence at the time of the transfer, although no warranty be mentioned in the deed."

This provision has been applied to all kinds of incorporeal rights, and especially to the transfer of judgments (Toler vs. Swayze et al., 2 La. An. 880; Corcoran vs. Riddle, 7 La. An. 268; Jenkins vs. Parish of Caddo, 7 La. An. 559; Johnson & Co. vs. Boi & Frelsen, 4 La. An. 273).

Even in case of a stipulation of no warranty the seller is liable to restore the price (Civil Code, Art. 2505).

And the principle established by the above Art. 2646 has been applied by the courts of Louisiana to all manner of contracts.

Thus in the case of Constance Semel, Tutrix, vs. J. M. Gould et al., 12 La. An. 225, it appears that the parish of Pointe Coupée made a contract with the plaintiff for the building of a levee upon certain specified land, in which it was stipulated that the plaintiff should look for payment exclusively to the lien given by the law on the land for the cost of the work. But it turned out, after the work had been done, that the land belonged to the United States and was not liable. The contractor thereupon sued the parish and recovered judgment, in affirming which the Supreme Court said:

"In making the contract for building the levee there was an implied warranty on the part of the Police Jury that the land on which the work was to be done belonged to a person whose property could be reached by their ordinances to defray the expenses of the work."

See also Tourniey vs. Municipality No. 1, 5 La. An. 298; Cronan vs. Same, 5 La. An. 537. To the same effect is the late case of Cole vs. Shreveport, 40 La. An. 841. The plaintiff in this case was to be paid for the cost of paving out of special assessments to be levied on propperty along the line of improvement, one-third by the municipality and two-thirds by the property owners. But this source of payment having subsequently failed on account of an illegality in the assessments, the Court condemned the municipality to pay the whole costs of the work, in this respect affirming the decisions we have quoted and referring to the decision of this Court in Hitchcock vs. Galveston, 96 U. S. 341, as conclusive on the question.

The same principle was recognized and applied in this Court, in District of Columbia vs. Lyon, 161 U. S. 200, where the district was held liable to a contractor for the cost of a local improvement, because it had neglected to levy a legal tax for its payment.

Another case directly in point is that of Meyer vs. Richard, 163 U. S. 385, in which Mr. Justice White, in a most exhaustive and learned opinion, reviews the principles of the civil law governing warranties of this character, in which he shows that this principle of warranty is of universal application under that system.

This bring us to the question of the binding effect of the judgments as a matter of strict law independent of all questions of express or equitable estoppel.

Ordinarily no one would have the assurance to deny the conclusiveness of a final judgment regularly rendered by

a court of competent jurisdiction in a proceeding to which the defendant was a party. Is the rule different in cases of judgments based on the assessment of a special tax? We think not. Freeman on Judgments, Sec. 135, places judgments for taxes upon the same general footing as other judgments in ordinary cases, and states, upon abundant authority, that they can not be impeached collaterally.

Passing directly on the question in Driggins vs. Cassady, 71 Ala. 533, the Supreme Court says:

> "While great accuracy is exacted in all such proceeding, and strict rules are applied for the protection of the taxpayer, the principle forbidding the collateral assailment of judgments had often been invoked in actions of this character."

Burrough on Taxation, 285.
Willshear vs. Kelly, 69 Mo. 343.
Eithel vs. Fort, 39 Cal. 439.
Cadmus vs. Jackson, 52 Pa. State, 295.
In Mayo vs. Foley, 40 Cal. 281, the Court says:

> "That while an owner of property which has been sold to pay a void tax by an executive officer may dispute the sale on that ground, he can not do so where the sale is made by a court in executiou of a judgment duly obtained."

This principle was clearly recognized by the Supreme Court of Louisiana in the suit of Davidson vs. New Orleans, 34 An. 170, which was a direct action brought by the plaintiff in the proper State court to have the drainage judgment against her set aside. While admitting that the judgment could not be attacked collaterally, the Court found that the plaintiff had a right to sue for its nullity on account of the subsequent failure of consideration resulting from non-completion of drainage.

In Louisiana not only are all judgments binding as adjudications, but parties are also estopped to deny the

truth of the allegations made in them. Says the Court, in Folger vs. Palmer, 35 La. An. 744;

> "Our jurisprudence has uniformly recognized and enforced the wise and salutary doctrine which firmly binds a party to his judicial declarations and forbids him from subsequently contradicting his statements thus made."

See also Farrar vs. Stracy, 2 La. An. 211; Dickson vs. Dickson et al., 33 Annual, 1370.

The same doctrine has been applied to the State itself (State vs. Taylor, 28 La. An. 460; State vs. Ober, 34 An. 360).

The Court of Appeals might have rested its decision on those strict legal estoppels, but it surely committed no error in applying to the transaction the same equitable estoppel recognized by your Honors in *Warner vs. New Orleans.*

V.

Another complaint is that the Court of Appeals erred in not holding that the issue of bonds by the city as a full discharge of its liability to the drainage fund, notwithstanding the decision to the contrary in *Warner vs. New Orleans.*

This contention is predicated on the theory that that decision was based on the state of facts then admitted by the demurrer, because it then appeared from the bill that Van Norden sold his property to the city without any notion that the city would claim it had been discharged by the issue of bonds, but that it now appears on issue joined that he had previously received those bonds in exchange for work warrants, and is therefore chargeable with knowledge of the consequences, and that he knew, from this fact, that the city would set up said discharge as a defence to the purchase warrants (R., p. 198). Actual notice and knowledge is not charged or proved.

On the contrary, Van Norden testifies that he had no such notice or knowledge when he made the sale, and would not have parted with his property had he suspected that any such inequitable claim would be made (R., p. 247).

The only notice he did have in regard to the bonds was contained in Sec. 13 of Act 73 of 1872, which provided that the drainage taxes should be first applied to the payment of warrants, and only the surplus to redeem the bonds, which directly negatived any idea that the issue of bonds should extinguish the drainage fund (Statutes, p. 13).

If the city intended at the time it made the purchase to avoid payment of the price on the ground that the fund out of which the warrants were made payable had no existence, and did not notify Van Norden of its purpose, it was guilty of obtaining the property under a false pretence. And if Van Norden parted with his property with this knowledge he was nothing less than an idiot, who ought to be protected by a court of equity. Courts do not indulge in such presumptions for the purpose of defeating contracts lawfully entered into upon a valuable consideration.

VI.

Another complaint is that the Court of Appeals erred in not deciding and sustaining the plea of *res adjudicata*, based on the decision of this Court in Peake vs. New Orleans (139 U. S. 323).

This so-called plea is embodied in the answer to the bill (R., p. 201), but it does not set out any part of the record or decree, showing what the Court decided, or who were parties, as is required by the rules of pleading. Nor is it averred by the answer or shown by the evidence that Warner was a party or privy thereto. Moreover, that suit was based on work warrants, which your Honors have distinguished from the purchase warrants in this case, as governed by a different rule of law. What better could the Court do than ignore such a plea?

VII.

Another complaint is that the Court of Appeals erred in not holding that the city had a right to abandon the drainage work without incurring any liability to holders of purchase warrants, as decided in Peake vs. New Orleans in relation to work warrants.

It ought to be a sufficient answer to this contention to say that the right to abandon the work and thus destroy the fund is not pleaded as a defence to the bill. On the contrary, the defence set up in the answer is based on the theory that the city has performed all its obligations by executing the stipulation of the contract of purchase, and the answer is stuffed with averments from beginning to end that the city has at all times made the most diligent effort to complete the work and collect the assessments, but has failed to do so on account of defects in the drainage plan for which the canal company and its transferee are alone responsible—an excuse, as we have shown, utterly untrue. The city did not dare to plead abandonment as a defence, in the face of your Honors' decision in Warner vs. New Orleans, that it was under a duty to make the drainage fund good and available for the payment of these purchase warrants.

VIII.

Another complaint is that the Court of Appeals erred in not holding that the Acts Nos. 48 and 67 of 1877, and Sec. 40 of Act 20 of 1882, authorized the city to abandon he work, and were a full defence in this suit.

But no such defence was made in the answer. On the contrary, it asserts, in response to the twenty-fourth clause of the bill averring that said laws are unconstitutional, because they attempted to impair the obligation of complainant's contract, that the city never used such laws—

> "As a pretence to cease or omit in any degree the effort to drain said lands and to collect said drainage

taxes, * * * but the facts are that after, as before the said acts, defendant's efforts to effect the drainage of said lands and collect the taxes were persistent and continued, * * * and that the fact had not the least influence to diminish, nor did it diminish in any degree, the efforts of this defendant to drain said lands or collect the said taxes" (R., p. 196).

Moreover, these facts, if pleaded, would have afforded no defence, as the Supreme Court of the State has held them to be unconstitutional and void as against these very warrants, in the case of New Orleans Canal and Banking Company vs. Van Norden, 30 An. 1371. Besides this, such a plea, if made, would have been inconsistent with the theory of the defence, set up in the answer, that the city had disregarded them.

IX.

The answer to the bill charges that the property sold by Van Norden was of infinitesimal value, and that the sale for the price stipulated to be paid therefor was a fraud on the city and its taxpayers (R., p. 199).

But as Van Norden is not connected with the alleged fraud by any specific averment, or by any proofs in the record, and no relief is prayed with reference to the sale on that account, by cross bill or in the answer, and no ruling of the Court on the subject is assigned as error, the language used must be treated as simply scandalous and without effect.

The admitted truth is that the appraiser appointed by the city found that the dredge boats and machinery cost originally $205,000, and he valued them, deducting 25 per cent. for depreciation, at $153,750 (R., p. 91).

The balance of the price was paid for the franchise, as authorized by the act of 1876. If any element of fraud existed it is chargeable solely to the city in getting possession of the property with the confessed intention of not paying for it.

X.

Another complaint is that the Court of Appeals erred in not giving due effect to the appointment of a receiver for drainage taxes, and requiring complainant to proceed against such receiver.

The only averment in the answer on this subject "is that in the case of vs. this defendant was ordered and rendered an account of all drainage taxes, and defendant submits that there is no reason to renew the call or order for such account" (R., p. 199). But there is no suggestion that there was a receiver in the case, nor that the city had discharged itself of liability by paying the drainage fund into the hands of any receiver. On this state of the record we submit that the Court of Appeals gave due effect to such a plea by ignoring it.

XI.

Another complaint is that the Court of Appeals erred in overruling defendant's pleas of prescription of five and ten years. It is claimed that the warrants sued on fall within the prescription of five years established by Art. 3540. This article reads as follows:

> "Actions on bills of exchange, notes payable to order, or bearer, except bank notes, those on all effects negotiable, or transferable by endorsement or delivery, and those on all promissory notes, negotiable, or otherwise, are prescribed by five years, reckoning from the day when the engagments were payable."

Under the settled rule in Louisiana, this article applies exclusively to unconditional promises to pay a fixed sum of money, whether the obligation be negotiable, or not. Instruments lacking these essential characteristics have never been held to come within its provisions.

Any condition inserted in an obligation takes it out of this rule.

Lewis vs. Thompson, 22 An. 450.

Thus it was held in Bird vs. Livingston, 1 Robinson, La. Rep. 183, that an order payable out of a particular fund, when collected, does not come within the article. So it was held in Jouett vs. Irwin, 9 La. R. 231, that an agreement of an agent to collect and pay over the proceeds of notes placed in his hands for collection, as it did not bind him absolutely, does not fall within the class of instruments prescribed by five years.

Classifying these very drainage warrants and defining their character in the case of Davidson vs. New Orleans, 34 La. An. 177, the Supreme Court says:

> "Payment of these warrants is therefore to be regulated by the provisions of the authority under which they were issued, and that authority expressly confines it exclusively to a special fund when realized, and if realized it takes place from the drainage assessments and not otherwise. The payment therefore was to be completely hypothetical, contingent upon eventualities, susceptible of happening, or not."

The prescription applicable to warrants of the same character as those involved here has heretofore been the subject of judicial decision in the courts of the State.

In Fisher vs. Board of Directors of the City Schools of New Orleans, 44 La. An. 185, the plaintiff brought suit on certificates issued to teachers of the public schools for their salaries, which were payable out of the revenues of the board for the year in which they were issued, and prayed for judgment payable from the school taxes levied by the city of New Orleans prior to 1879. The board denied any indebtedness; but judgment was rendered recognizing the plaintiff as a creditor of the scool fund, to be paid in due course, out of the school taxes levied prior to 1879. This judgment was affirmed on appeal, the Supreme Court holding that although the judgment could not be executed, it served the purpose of a recog-

nition of the claim of the holders to be paid out of taxes levied in 1873 and subsequent years when collected.

Later, a similar suit was brought by James F. Gasquet, to which the board for the first time pleaded the prescription of five and ten years. The District Court overruled the pleas and rendered judgment against the board in the same form as in the Fisher case. Upon appeal the Supreme Court, after reviewing its former ruling, said:

> "We think the pleas of prescription are not well founded. Act 36 of 1873 makes it very clear that the claims evidenced by these certificates were not payable absolutely, or at any particular time. They are payable only out of the revenues of the year for which they were issued, and only when said revenues are collected, and in the manner therein provided; and the act further declared that no writ of *fi. fa.* or mandamus shall lie for the seizure of any school money, or to direct or enforce its paying out, otherwise than in the manner and sequence required in this act. This law formed a part of the contract out of which these claims arose, and deprived the claimants of any legal remedy to enforce payment, except out of particular revenues when collected and turned into the treasury. The case is very much stronger and clearer than that of Kings Bridge Manufacturing Co. vs. Otoe Co., 124 U. S. 459, in which the Supreme Court of the United States held that county warrants, payable only when there are funds in the treasury applicable thereto, are not actionable until the money for their payment is collected, and therefore not subject to the statute of limitations except from the same time. There is neither allegation nor proof in this case that there have been at any particular time funds in the School Board treasury applicable to the payment of these claims, and we can not assume that such fund exists beyond the term of five or ten years. The party who pleads prescription is bound to prove the fact necessary to sustain it. The present action itself is not properly an action of debt but is in effect simply an action to compel recognition

of the certificates as entitled to participate in the distribution of the fund applicable thereto, now or hereafter collected."

Gasquet vs. School Board, 45 An. 342.

This decision of the Supreme Court of the State is clearly decisive of the question of prescription involved in this case. In that case the defendant alleged that it had no unexpended money in its hands derived from the revenues, of the years out of which the certificates were payable, applicable to their payment. And the Court held that the Board not having alleged that it had funds in its possession at any particular time within five or ten years so applicable, the plea of prescription must be overruled.

Here the city admits that it has collected some drainage taxes, as the School Board did, but alleges that the whole fund has been accounted for and applied in accordance with law (R., p. 195), without averring or showing that there was ever at any time money in its hands, within five or ten years prior to the date plaintiff's bill was filed, applicable to the payment of purchase warrants as a starting point for the statute of limitation to commence running.

It was for this precise reason that the Court denied the plea of the statute of limitation in King Bridge Manufacturing Company vs. Otoe, 124 U. S. 459, referred to in the Gasquet case.

Moreover, the answers of the defendants denying the possession of any fund applicable to the payment of the certificates and warrants, were repugnant to the pleas, and, on well established principle, had the effect of overruling them, even if they had been properly drawn.

The judgment in the Fisher case having been a mere recognition of his right to be paid out of the revenues of a particular year, when collected, afforded him no relief. And, as might be supposed, he was compelled to bring another suit to obtain satisfaction. He accordingly filed a bill in the United States Circuit Court against the School

Board and the city of New Orleans, similar to the one in this case, for an accounting of school funds alleged to be applicable to the payment of his certificates, but withheld. To this action the board pleaded the prescription of ten years. But the Court overruled the plea, and on the merits decreed the board and the city accountable for certain funds which it found ought to be applied to the payment of the certificates. This decree was affirmed by the Circuit Court of Appeals, January 17, 1899, under the authority of the decision in the Gasquet case, the Court holding that as the certificates were not prescribed the action for an accounting was not.

City of New Orleans vs. Fisher, 91 F. R., p. —.

The proceeding in this suit is of the same character, with the single difference, that instead of first obtaining a valueless judgment at law recognizing his right to be paid out of the drainage fund when collected, the complainant has filed a bill praying recognition of his claims, and the establishment of a fund for their payment, for the purpose of obtaining that full relief in a single suit, which a court of equity is always competent to afford.

Considering the question of prescription as a purely legal one, apart from any element of trust, we submit that the ruling of the Court of Appeals was entirely correct under the settled jurisprudence of the State of Louisiana and of this Court on the subject.

The prescription of ten years, although covered and disposed of by the decision in the Gasquet case, seems to require some further consideration, as it is sought to be applied to the judgments against the city rather than the action to the action for an account. Error in respect to the ruling of the Court of Appeals on the plea is set ou in the tenth assignment (R., p. 580).

The substance of the assignment is that, notwithstanding the recognition of the trust by the city resulting from the averment in its answer that it had up to the date of the

filing of the bill collected some drainage taxes due by private persons and applied them according to law, and had continually endeavored, by all means in his power, to collect other taxes and to complete the drainage work, still the judgments against the city became prescribed in its hands by the lapse of ten years, under Art. 3449 of the Civil Code, because the city in its answer had denied their validity; and that for this reason the Court erred in holding that the recognition extends to the judgments against the city and takes them out of prescription.

The contention seems to be that the judgments against the city, composing part of the trust fund in its hands, became prescribed by the mere lapse of time, notwithstanding the fact that it was actively engaged in executing the trust during the same period. But no authority is cited, and none ought to exist, for such a proposition. On the contrary, the law is well settled, at least in Louisiana, that there is no such thing as prescription running in favor of a trustee against a debt which he owes to the trust. This the Supreme Court of the State expressly decided in McKnight vs. Calhoun, 36 La. An. 408, in which the Court held that an administrator, so long as he administers an estate, can not plead the statute in discharge of his own liability to the estate. Upon the same principle, it was held in Succession of Farmer, 32 La. An. 1037, that prescription does not run on a claim of an administrator against the estate so long as he remains such administrator.

The maxim *Contra non valentem* applies to parties so situated.

In this respect no such distinction exists between judgments and ordinary debts, as is suggested by the learned counsel for appellant.

Judgments are debts in Louisiana, as elsewhere, and although they may be kept alive by suit to revive, as authorized by Art. 3547 of the Civil Code, this mode is

not exclusive of other methods. At one time it was supposed that the statute operated silently upon the judgment and extinguished it at the end of ten years by the mere passing of time, unless revived by suit under that article, but the Supreme Court of the State has in two well-considered cases recently decided that the prescription of judgments may be interrupted, or suspended, in the same manner and for the same causes which operate with regard to ordinary debts (Levy vs. Calhoun et al., 34 La. An. 413; Succession of Saunders, 37 La. An. 769).

Not only is the statute suspended as to debts due by a trustee to the estate he administers, but he is treated, in law, as if he had collected the same, and is chargeable with the amount as an asset in hand.

Says Perry on Trusts, Sec. 440:

> "If a trustee himself owes the estate he must treat his indebtedness as an asset collected."

In Sigourney vs. Wetherll, 6 Metcalf, 557, the Court said:

> "It is now well settled, whatever may have formerly been the rule, that a testator by making his debtor executor does not give him the debt by way of legacy, nor release, or discharge it. But as an executor or administrator can not demand or receive payment of himself, and can not sue himself, and yet is bound to account for his own debt, that debt must be considered as an asset. Where the same hand is to pay and receive money the law presumes as against the debtor himself that he has done what he was legally bound to do and charged himself with the amount as a debt paid."

See also Commonwealth vs. Gould, 118 Mass. 307, and cases therein cited.

The rule leaves no field for the operation of the statute in this case. We come now to consider as to what extent and under what circumstances prescription is applicable.

to an action brought by a *cestui que trust* against a trustee to enforce his rights.

The general rule is clearly stated by this Court in Lewis vs. Hawkins, 23 Wallace, 126, as follows:

> "As between trustee and *cestui que trust*, in case of an express trust, the statute of limitations has no application. Accounts of administrators have been decreed against trustees extending over periods of thirty, forty, and even fifty years. The relations and privity between trustee and *cestui que trust* are such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation."

Says Perry on Trusts, Sec. 863:

> "The trustee must clearly repudiate the trust with notice to the *cestui* before the statute can begin to run. The mere fact that money due the *cestui* is allowed by him to remain in the trustee's hands, does not change the nature of the debt; it continues to be a trust debt, upon which neither the bankruptcy of the trustee, nor the statute of limitations can take effect."

The rule in Louisiana under the civil law is the same. The most conclusive decision on the subject is found in Southern Mutual Insurance Company vs. Pike, 32 La. An. 483. That was a suit brought against the heirs of W. S. Pike for an accounting of the assets of the plaintiff company, which were charged to have come into his hands as treasurer. In the first instance the Court held that, under the civil law, there was no prescription which would protect an agent from accounting. Subsequently, upon the coming of the account, the Court allowed the time for prescription to begin running from the date of the last entry made by Pike in the books of the company (*Id.*, p. 488), treating the entry as the latest act of recognition of the trust, and as the starting point of the statute of limitations.

In the present case the defendant's answer expressly recognizes the trust by alleging performance, and tendering an account which shows collections of drainage taxes since 1871, the last entry being for an amount collected on the 20th of June, 1891, only three years before the bill was filed (R., pp. 343-8).

Our case comes clearly within these rules which the courts of the State have recognized as governing ordinary trusts arising out of agency and similar relations. Those courts, however, have held in a later case that prescription has no operation on trusts created, as in this case, by statute.

In School Directors vs. City of Shreveport, 47 An. 1310, which was an action to compel the defendant to account for a fund alleged to have been collected for the plaintiff, but withheld, the Court said:

> "The amount collected by taxation for a specific purpose is a trust fund. The application of the fund is usually enforced by mandamus. We can not see the application of prescription to protect a municipal corporation from liability for the fund thus collected and withheld."

And the learned counsel for the city after claiming prescription against the warrants and against the action have finally admitted the full force of this decision, for, at page 29 of their brief filed in support of the application for certiorari, they say:

> "The city does not plead prescription against her accountability as trustee of the drainage taxes. She claims the judgments against herself had been extinguished by prescription."

In conclusion on this branch of the case, we call attention to the fact that the plea of prescription of ten years covers only plaintiff's action, and does not purport to extend to the judgments against the city. And the plea, so

far as it applies to the action, is fatally defective in not alleging that it disowned the trust and ceased to act, at any particular time, ten years prior to the filing of the bill.

It fixes no date for the beginning of the statute, which is fatal to the plea under the rule laid down in the Gasquet case. Moreover, if the plea had been properly framed to bring the city within the rule, the allegations of performance and execution of the trust up to the date of the filing of the bill is repugnant to and overrules it.

It only remains to consider the suggestion that the warrant holders, being parties in interest, ought to have brought suits to revive the judgments, as the city could not sue itself.

This supposed difficulty, however, seems only to have been discovered after the present suit was filed, for the city actually brought proceedings in its own name, to revive the judgments in the Second and Third Districts; and obtained orders reviving them (R., pp. 54, 68, 70, 78). In one of the petitions to revive, the city states that in its opinion the proceeding was unnecessary, but had brought it out of abundant caution to protect the interest of all parties (R., p. 78).

In this we quite agree with the city, for if the city was incapacitated to sue owing to her double character of debtor and trustee, prescription was clearly suspended under the maxim *contra non valentem*, and revivor was unnecessary.

But if the city had really desired to do its duty, the mere filing of a petition to revive would have answered every purpose, as it would have recognized the debt, and interrupted the course of prescription. Why the necessity of the warrant holders filing a petition to revive under these circumstances? The duty to preserve the fund rested on the city, and not on them.

XII.

Another complaint is that the Court of Appeals erred in its construction of the amendment of the Constitution of the State of 1874, limiting the debt of the city of New Orleans.

This amendment reads as follows:

> "The city of New Orleans shall not hereafter increase her debt in any manner or form, or under any pretext. After the 1st of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt be not thereby increased; nor to prevent the issue of drainage warrants to the transferee of contract under Act No. 30 of 1871, payable only from drainage taxes, and not otherwise."

The contention is that the act of the Legislature which authorized the city to purchase the drainage plant and franchises is null and void, because it had the effect of increasing the debt of the city in violation of the supposed prohibition contained in said constitutional amendment of 1874.

Our answer to this is that the assessments, both against the city and individuals, were all in existence long prior to the adoption of said amendment, and were levied and reduced to judgment as follows:

That in the First District was levied on September 13, 1861 (R., p. 110), and reduced to judgment for the first instalment thereof on March 11, 1863 (R., p. 24), and for the remaining instalments on March 21, 1874 (R., p. 28).

That in the Second District was levied March 11, 1861 (R., p. 111), and for the part of said district lying in the

parish of Jefferson was reduced to judgment March 15, 1869 (R., p, 50), and for that part of said district lying in the parish of Orleans was reduced to judgment November 16, 1868 (R., p. 62).

That in the Third District was levied June 11, 1872 (R., p. 111), and was reduced to judgment November 13, 1872 (R., p. 74).

That in the Fourth District was levied November 19, 1872 (R., p. 112), and was reduced to judgment March 15, 1873 (R., p. 89).

It seems to us that by its clear and express terms the amendment excludes from its operation the liability of the city, whatever such liability may be, growing out of its relation to drainage matters. The ordinance left, and intended to leave, untouched all such liability. It, in effect, affirmed the existence of the drainage fund in all its component parts, including the liability of the city as assessee of the streets, squares and other public places, which constituted nearly one-half of the fund; and it affirmed that the fund so established was applicable to the payment of all warrants drawn against it for drainage purposes, and incidentally recognized the validity of the act of 1871, which confirmed and made exigible—*i. e.*, payable—the assessments against the city, as they appeared in the various tableaux and judgments rendered thereon. And lastly, it recognized and established the validity of the drainage contract, and affirmed the right of the city to issue, and of the transferee of the contract to receive, warrants against the fund, as the Supreme Court of the State declared in 27 An. 497, where the court, at p. 499, said:

> "The transfer, whether in pledge or in full property, made to him by said company, has been recognized by the Legislature in Act 22 of the Acts of 1874, proposing an amendment to the Constitution, limiting the debt of New Orleans, and is now a part of the organic law of this State."

No other construction can be given the amendment without imputing to its authors the intention of defrauding those who might deal with the city under its invitation and permission.

Yet the Court is asked to hold, by construction, that a constitutional amendment which authorized the city to draw warrants against this drainage fund operated to destroy aad render it valueless by prohibiting the city from paying into the fund the taxes out of which the warrants were to be satisfied. Authority to draw warrants against the fund necessarily carried with it by implication a duty and obligation on the part of the city to apply the drainage taxes, including those the city itself owed, to their payment. These taxes being debts of the city at the date of the adoption of the amendment, can not by any reasoning be included in the clause prohibiting an increase of the indebtedness of the corporation after January 1, 1875. The amendment, even if it had provided in express terms that no debt of the city of New Orleans should be valid, would be construed to apply to future transactions only, for it is a fundamental rule of interpretation that laws apply to the future and not the past.

McEwen vs. Dew, 24 H. 242.

But construing the amendment from a broader standpoint, and in the light afforded by the circumstances under which it was adopted, it seems clear that the authors intended to exclude all matters of drainage from its operation, and to leave the city free to carry out the plan of improvement then in course of execution. The drainage work has been in progress during three years and was yet unfinished; and we think it may fairly be assumed that the purpose of inserting a clause in the amendment authorizing the city to draw warrants, payable out of drainage taxes, was to permit the city to complete the improvement, and to use the drainage fund to its full extent for that purpose, as provided in the legislation then in force. The

powers and duties of the city in this respect were neither abridged in terms, nor increased, but were on the contrary expressly continued and affirmed.

It is contended, however, by the learned counsel for defendant that the assessments against the city are void and do not constitute a debt of the city, and that therefore the act of 1876, authorizing the purchase from Van Norden, increased the debt of the city contrary to the prohibition contained in the amendment, and for that reason is void.

Our answer to this is that even if the drainage taxes assessed against the city were not debts, the amendment simply prohibits an increase of the city debt after January 1, 1875, but imposes no limitations on its right to contract an indebtedness after that date, unless its debt should thereby be increased in excess of the amount it then owed. Whether, therefore, the act of 1876, authorizing the purchase, increased the debt, is a question of fact, which can only be determined by evidence showing the amount of the debt on the first day of January, 1875, and on the 6th of June, 1876, when the purchase was made. Neither the pleadings nor the proofs in this case show these facts. If, therefore, the act of 1876 did, in fact, for the first time impose on the city a liability for drainage taxes to the extent of $300,000, as contended by defendant's counsel, it does not follow that the debt of the city was increased thereby. Certainly this Court can not assume the existence of the fact to support a mere suggestion that a law of the State is unconstitutional. On the contrary, courts always indulge the presumption that the Legislature, before passing a law the constitutionality of which depends upon the existence of particular facts, found the facts to be such as to warrant the legislation.

In Cooley's Constitutional Limitations (5 Ed. 222) the author says:

"If evidence was required, it must be supposed that it was before the Legislature when the act was passed; and if any finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be deemed equivalent to such finding."

A very full discussion of this question will be found in the case of United States vs. Demoines, etc., 142 U. S. 544, to which we refer the Court.

But it can make little difference whether the act of 1876 was constitutional or not, because defendant has had the benefit of the act of the Legislature of which he now complains, in the acquisition and enjoyment of property, acquired at a purchase made in pursuance of the provisions thereof.

In Daniels vs. Tierney, 102 U. S., page 415, the Court, at page 421, said:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself, for his own benefit, of an unconstitutional law, he can not in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full and conclusive effect."

If the act of 1876 was in fact unconstitutional, the city of New Orleans contracted to purchase in error of law. D'Aguesseau, in his dissertation on Mistakes of Law, printed in Vol. 2 of Pothier on Obligations, p. 350, says:

"Error of law ought not to give any person a title of acquisition; the reason is evident, and Cujas comprises it in his Commentary on Law, 8 ff. *de juris facti ignorantia*, otherwise an ignorance of law would be an advantage to one making a mistake. * * * Hence those solemn definitions of law; ignorance of the law does not profit those who are desirous of acquiring an advantage."

Domat, after declaring that error of law is not sufficient as an error of fact is, to annul contracts, says:

> "(1) If error, ignorance of law, be such that it is the only cause of the contract in which one obligates himself to a thing to which he is not otherwise bound, and there be no other cause for the contract, the cause proving false, the contract is null. (2) This rule applies not only in preserving the person from suffering a loss, but also in hindering him from being deprived of a right which he did not know belonged to him. (3) But if by an error or ignorance of the law one has done himself a prejudice which can not be repaired without breaking in upon the right of another, the error shall not be corrected to the prejudice of the latter."

See note at foot of Sec. 139, 1 Story Equity Jur.

Says the Supreme Court in Griswold vs. Hayard, 141 U. S. 284:

> "Mere mistakes of law stripped of all other circumstances constitute no ground for the reformation of written contracts."

And the law of Louisiana is in harmony with these principles, for Art. 1846 of the Civil Code declares that error at law can never be alleged to acquire the property of another.

XIII.

Another complaint is that the act of 1876 did not provide for the payment of interest, and that the Court of Appeals erred in allowing interest.

This, however, is not alleged by the city as a defence. In its amended answer (R., p. 202) after reiterating the averments of the original, it merely says, "this respondent is in no manner bound, or liable in any manner on, or for, or in respect to said warrants, and least of all, for any alleged interest thereon," but the authority to stipulate for interest on the warrants under the act is not questioned

The objection now made that the stipulation is *ultra vires* is sought for the first time to be imported into the record by the assignment of errors. This can not be done.

Aside from this, however, there is nothing in the objection. The act of 1876, after authorizing the city to make the purchase, provided in the 33d section, "that all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the city of New Orleans, which said warrants shall be issued *in the same form and manner* as those heretofore issued to the transferee of said company under Act No. 30 of acts of 1871 for work done. They shall be paid out of drainage assessments."

The form and manner of issuing warrants under that act is prescribed by the 8th section, as follows:

> "It shall be the duty of the Administrator of Accounts on the presentation to him of said certificates of the City Surveyor or Engineer appointed by the Board of Administrators, by the President of said Mississippi & Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavating and fifty (50) cents per cubic yard for protection levee, and said warrants to be of such denomination as may be required by the president of said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi & Mexican Gulf Ship Caoal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to endorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of 8 per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants."

The purchase warrants were issued in exact compliance with the requirements of said section.

They were drawn by the Administrator of Accounts on the Administrator of Finance, and contained the condition that if not paid in cash on presentation, the fact should be endorsed on them in writing by the Administrator of Finance, and that they should thereafter draw 8 per cent. per annum interest until paid. That they were presented for payment, but not paid at the date of the sale, appears from the proper written endorsement made on each warrant (R., p. 109).

In prescribing this form of warrant to be issued, we submit that the act of 1876 expressly authorized the city to stipulate for interest.

Indeed, if the act had been silent on the question of interest, it is clear that the authority to pay the purchase price in warrants payable in the future, would necessarily carry with it the implied authority to contract for interest, just as authority to an agent to borrow money has been held to grant, by implication, the power to secure the loan by a pledge of the property of the principal (Hatch vs. Coddington, 95 U. S. 48).

XIV.

It is further claimed that the Court of Appeals erred in decreeing the city to be an absolute debtor for the amount of the warrants sued on.

But the slightest examination of the decree will show that the Court merely found as a fact that the city was a debtor for the amount of the warrants sued on by complainant, and that he and others similarly situated who might prove their claims will, upon an accounting of the drainage assessments, be entitled to absolute judgments against the city to the extent of the fund that may be established for their benefit (R., pp. 514–5).

The decree is perfectly correct in form and substance,

and was the only decree the Court could properly render after finding the city liable to account for the drainage fund.

Wherefore appellee prays that the decree of the Court of Appeals be affirmed.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellee.